JD–23—05
Pawtucket, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IZZO ELECTRIC & SON

and 1—CA—41706

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 99,
AFL—CIO

Elizabeth A. Vorro, Esq., for the General Counsel.
Thomas J. McAndrew, Esq., of Providence, Rhode Island,
for the Respondent.
John P. Shalvey, of Cranston, Rhode Island,
for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Pawtucket, Rhode Island, on February 15, 2005. The charge was filed April 15, 2004,[1] and the complaint was issued September 30.

The complaint alleges that the Company refused to hire or consider for hire 11 applicants for employment because those applicants engaged in protected union activities and in order to discourage employees from engaging in such activities.[2] The Company's actions are alleged to violate Section 8(a)(3) and (1) of the Act. The Company filed an answer, denying the material allegations of the complaint.

As described in detail in the decision that follows, I conclude that the General Counsel met his initial burden of establishing that the Company was hiring electricians and that 10 of the applicants named in the complaint met the qualifications for this position. I further find that the General Counsel failed to meet his additional burden of establishing that unlawful animus formed a material or significant part of the reason for the Company's failure to hire these

[1] All dates are in 2004 unless otherwise indicated.

[2] At trial, I granted counsel for the General Counsel's request to make minor amendments to the names of some of the individual applicants and the name of the Company. The amended list of the applicants in the order in which they are alleged to have applied consists of: Richard St. Amour, Timothy Brennan, William Callanan, Kevin Vanasse, William Smith, John Leonardo, Steven Brown, B. Donald Grossi, Kristine Birchall, Michael Lemieux, and David Pina. (I have spelled Ms. Birchall's given name as she provided it on her job application.)

applicants. Finally, I determine that the General Counsel also failed to establish that the Company refused to consider any of the named applicants for employment.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, is engaged in the construction industry as an electrical contractor at its facility in Warwick, Rhode Island, and at various jobsites in Rhode Island, Massachusetts, and Connecticut. It annually purchases and receives goods valued in excess of $50,000 from points outside the State of Rhode Island and performs services valued in excess of $50,000 in states other than Rhode Island. The Company admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

This case stems from a confrontation between John Shalvey and Joseph Izzo, two men with long experience in the field of electrical construction work. Shalvey began as an apprentice in 1978. He became a journeyman wireman and is a member of Local 99 of the International Brotherhood of Electrical Workers. For more than 2 years, he has worked as an organizer for the Union. As part of his duties, he administers the Union's so-called "salting" program.[5] As he described it, this involves the selection of "targets," where union activists "will try to have our own people hired on either overtly or covertly with non-Union shops." (Tr. 26.)

Approximately 20 years ago, Joseph Izzo founded Izzo Electric & Son, a Rhode Island corporation operating in the electrical contracting business. Izzo is a licensed electrician who directs the affairs of the Company, including its entire hiring process. He employs approximately 21 journeymen and 17 apprentices in the electrical trade. The Company's employees are not represented by any labor organization.

Prior to his appointment as an organizer for the Union, Shalvey had already focused his attention on the Company. Acting as a union representative, on January 2, 2003, he addressed a letter to Izzo, noting that the Company had been advertising in the newspaper for employees.

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[3] As is virtually inevitable, there are a number of errors in transcription. I have attached an appendix to this decision containing various corrections. Any additional errors are not significant or material.

[4] See, the Company's answer to the complaint, paragraphs 3, 4, and 5, and counsel for the Company's oral stipulation. (GC Exh. 1(f) and Tr. 11.)

[5] For a discussion of the origin and meaning of this colorful term, see the administrative law judge's decision in *Wayne Erecting, Inc.,* 333 NLRB 1212, fn. 1 (2001). An interesting and detailed description of the strategy and tactics of salting as employed by other locals of the International Brotherhood of Electrical Workers is contained in the administrative law judge's decision in *W.D.D.W. Commercial Systems & Investments, Inc.,* 335 NLRB 260 (2001), enf. in part, 323 F.3d 1051 (D.C. Cir. 2003).

He enclosed 10 documents entitled, "Application for Employment," and requested that the Company "please accept" them. (R. Exh. 1.) Rather curiously for someone seeking to recommend applicants for jobs, he mailed the packet to Izzo by certified mail.

These self-described applications for employment are noteworthy for the cursory manner of their completion. Strikingly, while the forms contain home address information, they fail to list any telephone numbers for the persons seeking employment. In addition, the supposed job applicants did not provide key information. For example, Joseph Anderson and Eric Munson indicated that they had many years of experience in the trade, but neglected to complete the section of the form that described their past employment history. Kevin Curran merely noted that his past work history included, "residential, commercial, industrial, medical, [and] pharmaceutical" work. (R. Exh. 1.) Donald Grossi, Brian Paul, Gregory Bowman, Anthony Rossi, Luca Gredo, and Joseph Simons listed prior employers, but failed to provide any details, including the dates of employment. The only form that was completed in a manner that would provide a reasonably adequate picture of an individual's qualifications for employment was that prepared by Joe Walsh. Walsh made clear that his interest was limited to a foreman's position with a salary requirement of $50,000 per year. None of these individuals submitted an application on the Company's own employment application form. Nor was there any evidence that they contacted the Company directly in order to seek employment.

While the forms submitted by Shalvey were vague about employment qualifications, they were quite specific in reporting that each applicant was a member of the Union and, with the exception of Walsh, each sought wages consistent with the Union's pay scale.[6] Izzo testified that he examined Shalvey's communication and thought it was "odd." (Tr. 206.) He received subsequent letters with attached forms in the following days. (R. Exh. 1.) These were similarly casually prepared and incomplete.

Shalvey was appointed to his current position as an organizer for the Union in October 2003. He testified that, as of that time, he began to take an "active interest" in the Company. (Tr. 62.) Shalvey's appointment coincided with another newspaper advertising campaign by the Company. It ran ads in the *Providence Journal* from October 25, 2003 through February 18, 2004. The ads sought applicants for positions as licensed electricians. (R. Exh. 21.)

In response to the Company's ads, during the following months, Shalvey sent three Union members, Paul Stromberg, James Battersby, and Michael Hafner, to apply for employment. He instructed each of them to be honest in preparing their applications, but not to announce that they were planning to become involved in organizing the Company. Each of these men applied individually and completed the Company's employment application form.

Battersby completed his application on December 18, 2003. (R. Exh. 26.) While the application does not indicate membership in the Union, Izzo provided uncontroverted testimony that Battersby informed him of his membership during his employment interview. Battersby was hired and remains employed by the Company.

During this period, Shalvey initiated a more direct contact with Izzo. In December 2003, he telephoned Izzo and asked for a meeting with him to discuss affiliation with the Union. Izzo testified that Shalvey's proposal was not unexpected since he already knew about the Union's campaign to organize his work force. He had gained this knowledge because, "my men kn[e]w

[6] The forms either listed the Union's wage rate or indicated that the compensation desired was, "P.W." This was an abbreviation for the prevailing wage rate.

about this prior to that and they came to me and told me." (Tr. 205.) Izzo responded to Shalvey's proposition by reporting that he was not interested. Shalvey testified that, in light of Izzo's refusal to consider his proposal, he informed him that, "we will continue to pursue this organizing campaign." (Tr. 76.) Shalvey followed up with another call to Izzo several weeks later. After again being informed that Izzo was uninterested in the Union, Shalvey observed to Izzo that, "[y]ou are going to make me take this to the next level[.]" (Tr. 194.)

At this juncture, the third major participant in these events, Paul O'Brien, entered the picture.[7] O'Brien testified that he read one of the Company's newspaper advertisements in December 2003. He telephoned Izzo and arranged an interview. In his testimony, O'Brien was vague about when this interview took place. He first reported that his initial meeting with Izzo was in "early January." (Tr. 129.) Later, he changed this to, "December, early January." (Tr. 130.) Under cross-examination, O'Brien thought the date of the job interview, "could be [January] 11th. I am not 100% sure." (Tr. 163.) Still later, he indicated that it could have been, "[l]ate December, early January." (Tr. 163.)

Whatever the date, O'Brien testified that he did have a face-to-face interview with Izzo. At that time, he began to complete one of the Company's job application forms. He asked Izzo about the Company's compensation rates, learning that they were much lower than what he desired. O'Brien reported that Izzo was clearly interested in hiring him, given his extensive prior experience in the trade. Unfortunately, the two men could not come to an agreement as to pay. As a result, about 10 minutes into their conversation, O'Brien thanked Izzo for his time and departed.

On cross-examination, O'Brien was unclear about whether Izzo brought up the subject of the Union's organizing campaign during this initial interview. He clearly asserted that Izzo raised this subject when the two men spoke again some weeks later. As to the first conversation, he reported to counsel for the Company that, "I don't recall if it [was] at the first—it was definitely the second time, not the first time." (Tr. 158.) However, after having just ruled out the possibility of such a discussion during the first meeting of the two men, O'Brien reversed course, telling counsel that, "[h]e may have. I can't be 100% sure but he may have." (Tr. 158.)

Izzo's account of his interactions with O'Brien during the hiring process differed in significant aspects. At the outset, Izzo reported that O'Brien came to him as the result of a recommendation from an employee, Michael Croshaw. He indicated that, in late December 2003, Croshaw told him that he had worked with O'Brien in the past, and that O'Brien was, "a good worker, a good guy." (Tr. 212.) Izzo told Croshaw that he wanted to talk with O'Brien. Subsequently, in early January, he received a call from O'Brien and an interview was arranged.[8]

Izzo testified that O'Brien's job interview took place on January 13. At the commencement of the discussion, Izzo asked O'Brien "to start filling out the application." (Tr.

[7] Underscoring the fact that this case turns primarily on the actions of three men, Shalvey, Izzo, and O'Brien, it is noteworthy that they were the only witnesses called by the parties to testify at trial.

[8] O'Brien corroborated some of these points. He reported that, during his initial interview with Izzo, he mentioned that he had worked with Croshaw. He opined that he believed that, if asked, Croshaw would have given him a "good recommendation maybe but not a great one." (Tr. 157.) O'Brien's reservations about Crowshaw's opinion of him stemmed from their past employment together. He had been Croshaw's foreman on another job and had complained about Croshaw's tardiness.

213.) O'Brien complied. Izzo reported that he was impressed with O'Brien's work history. The two men discussed salary but were unable to reach agreement. As a result, Izzo testified that O'Brien, "hemmed and hawed about it. And he said, 'Well, I'll get back to you.'" (Tr. 214.) Thereupon, O'Brien, having "filled out the application halfway . . . left the application and left." (Tr. 214.)

Izzo testified that the job application form prepared by O'Brien on January 13 is the form that was introduced into evidence as GC Exh. 22. That form is dated at the top. Izzo reported that he was "sure" that O'Brien filled in this date during their interview on the same day. (Tr. 217.) On that form, O'Brien provided his contact information and the status of his driver's record and electrician's licensure. He did not fill out the portion of the form seeking information regarding his educational background and work history. In addition, he did not sign and date the application at the bottom.

Some weeks later, in February, O'Brien telephoned Shalvey in order to express his interest in joining Local 99. After this initial call, O'Brien noted that,

> I must have been a pain in [Shalvey's] side because I kept calling him like every week or two to find out more and more about the Union.

(Tr. 128.) They eventually scheduled an appointment. Shalvey testified that, at their meeting, O'Brien reported that he was currently unemployed. He explained that,

> he was in his early 50's and had been an electrician for a period of about 30 years. He was concerned about his retirement and not having any pension. And also substandard benefits that he had.

(Tr. 37.) O'Brien sought membership in the Union. In February or early March, he was given the Union's proficiency examination, a prerequisite to obtaining union membership.

While O'Brien and Shalvey were considering the question of union membership for O'Brien, Izzo commenced a renewed hiring process. He testified that he had refrained from any hiring in January because he had brought in a number of employees in December. However, by the end of January, his work force had been reduced through a "weeding out" process. (Tr. 209.) As a result, he began hiring in February. He continued his newspaper advertisement through February 18.

On February 4, Izzo hired Earl Turner. He reported that Turner had applied based on the newspaper ads. His employment history showed that he had worked for union affiliated companies. As Izzo put it, "you could see that he was union." (Tr. 209.)

Two days later, Izzo hired Michael Hafner. It will be recalled that Hafner was one of the men sent by Shalvey to apply. Izzo testified that he hired Hafner based on a favorable recommendation from Battersby, a current employee who was also one of Shalvey's salts. Izzo testified that Battersby spoke highly of Hafner and also told him that Hafner was a union member.

On February 9, Izzo hired Mounir Laouar and Paul Stromberg. He testified that Laouar applied based on the newspaper ad. During his interview, he told Izzo that he was a union member, adding that he was dissatisfied with the Union's efforts to keep him employed.

Although Izzo expressed the belief that Stromberg applied based on the newspaper ad, he was actually the third individual sent by Shalvey to apply for purposes of organizing. Izzo testified that he was aware of Stromberg's union membership at the time he decided to offer him employment. He gained this knowledge based on his review of Stromberg's past employment history and recognition that Stromberg had a relative who was a prominent former official of the Union.[9]

On February 16, Izzo hired Steven Day. Izzo testified that Day applied in response to the newspaper ad. His work history demonstrated his union membership.

At this point, Shalvey addressed a series of correspondence to Izzo. On February 16, he wrote him a letter noting that,

> [i]t is my intention to request recognition as Bargaining Representative for all Journeymen Electricians and associated Apprentices that currently work for Izzo Electric and Sons [sic].

(GC Exh. 24.) On the next day, he sent Izzo a second letter, informing him that, "Local 99 will be organizing your company." (R. Exh. 2.) This letter also advised that Stromberg had been designated as the Union's organizer. At the same time, he sent Izzo two further letters designating Hafner and Battersby as organizers. (R. Exhs. 3 and 4.)

Shortly thereafter, Shalvey changed his approach to the salting campaign. He reported that he sent additional applicants to the Company. Unlike their predecessors, these salts were instructed to wear union hats and, "make it clear that they were Union Organizers." (Tr. 32.)

The documentary record reflects that Gregory Bowman, Scott Bromage, and Kevin Borns applied for work on February 17. On their applications, Bowman and Borns indicated that they had received job training through the Union. (GC Exhs. 14 and 16.) Bromage's application was silent as to any association with the Union. (GC Exh. 15.) All of the applications revealed that the applicants were currently unemployed, having been laid off in November 2003 and January 2004. These men were not hired.

On the following day, Robert Gianfrancesco and Brian Murphy submitted applications. (GC Exhs. 19 and 20.) Both applications clearly indicated union membership. Both also indicated that they were unemployed, having been laid off at some prior unspecified time. Neither man was offered employment.

On February 19, Louis DeNobile and William Williams filed applications. (GC Exhs. 17 and 21.) Williams' application clearly indicated his union membership. DeNobile's application was silent as to such affiliation. Both men reported being unemployed. Williams indicated he was laid off in November, while DeNobile reported a layoff date in December. Neither man was hired.

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[9] Both Shalvey and Izzo testified that a knowledgeable reader could often determine a job applicant's union membership by examining his prior employment history. An applicant who had a history of working for companies with union contracts would likely be a union member. An applicant with a history of working for nonunion contractors would be less likely to belong to the Union.

On February 20, Kevin Bishop and Paul Ferrara submitted applications. (GC Exhs. 13 and 18.) Both men reported training through the auspices of the Union. Ferrara indicated that he had not worked since his layoff in May 2003. Bishop also indicated that he had been unemployed since December. These men were not offered employment.

As the month of February drew to a close, Shalvey escalated his activities directed at the Company by opening a new approach. On February 20, and again on February 24, Shalvey filed unfair labor practice charges against Izzo Electric. (R. Exhs. 5 and 6.) These alleged "intimidation" of an employee, Oscar Outlaw, and discrimination against Outlaw and Laouar. No details were provided in the formal charging documents.[10]

At trial, counsel for the Company asked Izzo to summarize his hiring decisions in the month of February. Their exchange went as follows:

> COUNSEL: Now you weren't doing any hiring other than union people in February?
>
> IZZO: Correct. I hired all union people. They came in. I took their applications. I never hired anybody in February, other than the people that I had already hired.
>
> COUNSEL: Other than the five union people[?]
>
> IZZO: Correct.

(Tr. 227.)

Shalvey reported that, in March, he decided to send in a second group of salts. He testified that he did so despite the fact that the Company was no longer advertising for employees and he was unaware of any specific position that was vacant at that time. As with the salts dispatched in February, these applicants were also instructed to wear union hats and specify that they were organizers.

As part of his many-sided organizing effort, Shalvey also employed another stratagem in March. This involved the use of O'Brien as a covert organizer. Shalvey testified that such a nonmember activist is known as a "pepper." (Tr. 90.) In fact, O'Brien testified that he initiated this idea. As he described it,

> I was talking with John [Shalvey] about organizing and he said that there is a possibility that—you know—there are several people at Izzo Electric that would like to be organized. And I volunteered to go and fill out another application.

(Tr. 131.) In an apparent contradiction of his testimony that he spoke about preparing "another" job application, he also reported that he did not recall telling Shalvey that he had previously

[10] No complaints were issued regarding these charges. The charge alleging discrimination against Outlaw and Laouar was withdrawn. (R. Exh. 7.) The record does not reflect the precise disposition of the charge involving supposed intimidation.

sought employment from Izzo. In any event, the men agreed that O'Brien would seek employment by the Company for purposes of covert organizing activity.

During the first part of March, O'Brien telephoned Izzo. Both men agree that they conversed by phone and reached an accord as to compensation. They disagree sharply regarding the next series of events. O'Brien testified that he met with Izzo on March 11. He reported that, during this meeting, he "filled out the application." (Tr. 132.) To be clear, O'Brien noted that the form he completed on this date was a "blank application." (Tr. 162.) It was not the same form he had begun preparing during his interview with Izzo in January. He testified that Izzo then requested that he backdate the application form to some time in January. According to O'Brien,

> I just asked him—if I remember correctly I just asked him why he wanted it backdated. I thought that it was kind of strange, which apparently he said that he was having some—hold on—I don't want to get this wrong. I think—problems with the Union was I believe the word that he used.

(Tr. 135.) O'Brien reported that he complied with Izzo's request, filling in the date of January 13 on the form. He indicated that he chose this date because it was his daughter's birthday. Izzo advised O'Brien that he did not need to complete the portion of the application that called for information regarding past employment. O'Brien left the application form with Izzo.

The two men discussed the question of O'Brien's start date. O'Brien indicated that he told Izzo that he needed some time to arrange his affairs since,

> I was home. I was on layoff. I was painting, finishing up. I had several rooms that were in disarray.

(Tr. 166.) As a result, the men agreed that O'Brien would report for work in 2 weeks.

Under cross-examination, O'Brien revealed a significant and puzzling piece of information. He testified that he and Izzo conversed about the Union during their meeting of March 11. He reported that he asked Izzo why he did not consider signing an agreement with the Union. Izzo responded that he was "thinking about it." (Tr. 172.)

In stark contrast to O'Brien's account, Izzo testified that there never was a second employment interview between the two men. Instead, they reached complete agreement during their telephone conversation. Furthermore, Izzo reported that he never requested that O'Brien complete a second application form and O'Brien never did so. He also indicated that, during their phone call, O'Brien asked to begin work in 2 weeks. His purpose in delaying his start date was to afford his current employer 2 weeks' notice. This was agreeable to Izzo. Finally, Izzo noted that during the phone call, O'Brien advised Izzo that he knew of some helpers who may be interested in employment and Izzo told him to have these men call him.

In his testimony, Izzo explained why he did not meet with O'Brien for a second job interview. As he put it,

> he came with a good recommendation [from Croshaw]. He seemed to be knowledgeable. He told me about all of the jobs that he ran. He looked like a guy with life. And I remembered him and it was only a couple of months later.

> And I said, "Yes." I had already met him once. I really don't have to meet him twice.

(Tr. 221.) Izzo was also questioned about his knowledge and opinions regarding O'Brien's status with the Union at the time he decided to offer him employment. He reported that, since O'Brien's past employers had been located outside Rhode Island, he could not ascertain his union status based on past employment. Nevertheless, he testified that he had "suspicions" that O'Brien was a union member. (Tr. 270.) This was because, "it was just odd that he traveled so much and with all of the union guys that we had coming in we just took an assumption." (Tr. 271.) Counsel for the General Counsel followed up with this exchange on cross-examination:

> COUNSEL: So you assumed that he was union when you hired him[?]
>
> IZZO: We weren't sure but we wouldn't have put it—we didn't care. Let's put it that way because I thought he was going to be a good worker. That is all that I really cared about.

(Tr. 271.)

Several days after hiring O'Brien, Izzo received a telephone call from Carlos Marte, one of the individuals mentioned by O'Brien as a possible candidate for employment as a helper. Marte prepared an employment application on March 16. (R. Exh. 22.) He was hired with a start date to coincide with that established for O'Brien.[11]

During this period leading up to O'Brien's hiring, Shalvey's second group of overt salts began the application process.[12] Richard St. Amour applied on March 18. (GC Exh. 2.) His application reflected that he had received training through the Union. It also showed that he had been laid off from his previous job on February 13. St. Amour did not receive an offer of employment.

Tim Brennan applied for a job with the Company on March 21. (GC Exh. 3.) His application clearly indicated his union membership. Rather curiously, he reported that he would be available for work as of April 23, although he also advised that he was currently unemployed, having been laid off on January 2.[13] He was not hired.

On the following day, William Callanan filed a job application. (GC Exh. 4.) His application showed that he had completed a union apprenticeship program. Callanan failed to provide a variety of highly material information, including the state in which he was licensed as an electrician and the license number. He did indicate that he was unemployed and had been without work since some unspecified time in 2004. Callanan was not offered work.

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[11] Izzo reported that Marte, an "excellent worker," remains employed by the Company. (Tr. 220.)

[12] Shalvey testified that these men were employed at the time they were sent to apply at Izzo. Actually, this is incorrect. Each of their employment applications revealed that they were unemployed.

[13] In a troubling omission to his application, Brennan failed to respond to the question seeking information about any prior criminal history.

The final member of this group of salts, Kevin Vanasse, filed his job application on March 23. It showed his job training through the Union. It also indicated that he had been laid off from his previous employment at some unspecified time in 2004. Vanasse was not hired.

Izzo testified regarding these applicants. He indicated that the Company was not advertising for employees and the men "cold called us." (Tr. 224.) He reported that he told them that, "we are not really looking for anybody at this time." (Tr. 224.) However, he indicated that, "[w]e'll file these [applications] for six months." (Tr. 224.)

O'Brien testified that he was sworn in as a member of the Union on March 23.[14] Approximately a week later, he began working for the Company.[15]

During this period, in addition to the salting activity, Shalvey attempted to apply pressure to Izzo through the use of a variety of hard-nosed and highly adversarial tactics. He sent pickets to a Company worksite. They were armed with signs asserting that the Company paid below standard wages. He also made formal complaints to the Rhode Island Division of Professional Regulation regarding the Company's practices involving apprentices. These complaints stemmed from information provided to Shalvey by one of his salts who was working for the Company. Most strikingly, Shalvey sent letters to Izzo's customers. In those communications, he reported that Izzo, "has been found to be a **law violator** in Rhode Island." [Emphasis in the original.] (R. Exh. 8.) Finally, on April 15, Shalvey filed the unfair labor practice charge in this case, his third such filing. (GC Exh. 1(a).)

At this time, the Company resumed hiring. On April 20, Keith Robbins filed a job application. (R. Exh. 23.) He was hired based on the fact that another employee had unexpectedly quit and Robbins was given a good recommendation from a current employee, Chris Celani.

Two days later, Izzo commenced running additional advertisements for employees. From April 23 through 29, he ran an ad seeking helpers. (R. Exh. 21, pp. 23, 24.) From May 5 through 11 he ran ads for licensed electricians. (R. Exh. 21, pp. 25, 26.) Izzo described his rationale as follows:

> I had just put an ad in just to see what kind of response that I would get just in case. I was anticipating some work starting because it was the end of winter. The Inskip job was starting to roll . . . if a diamond in the rough came in, bang—you know—if not, [. . .] I want a special person.

(Tr. 232.)

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[14] In an indication of O'Brien's difficulties in recounting dates of key events, on cross-examination, he changed the date of his initiation into the Union to March 22. Similarly, he reported that he was sworn in after he starting working at Izzo. Later on, he corrected this, noting that he was actually sworn in before he commenced his employment with the Company.

[15] There was some confusion as to when O'Brien began his employment. I instructed both counsel to research this further, with particular reference to records that the Company was required to maintain for tax purposes. This was done, and both counsel submitted a stipulation indicating that, "O'Brien began working for the Respondent during the week beginning March 29." (Stipulation dated March 24, 2005 and R. Br. at p. 5.) He worked 30 hours during that week.

Shalvey testified that he responded to Izzo's May advertisements by sending a second group of overt salts. These activists, all of whom were currently unemployed, were instructed to inform the employer that they were union organizers. The first group of these individuals applied on May 6.

On that date, William Smith filed an application indicating that he had received job training from the union and had served as a union steward. (GC Exh. 6.) Although his application indicated that he had been laid off in April, he reported that he would first be available for work on May 17.[16] Smith was not offered employment.

At the same time, John Leonardo submitted an application. He advised that he was, "an I.B.E.W. organizer." (GC Exh. 7.) He noted that he had last worked in February. His application was significantly incomplete since he failed to describe his prior employment as required by the instructions on the application form. He was not hired.

The final applicant on May 6 was Steven Brown. He also advised the Company that he was a union organizer. (GC Exh. 8.) He indicated that he had last worked on April 28. Brown was not offered employment.

On the next day, two more salts filed their applications. Donald Grossi noted that he was an organizer. (GC Exh. 9.) He reported that he had been laid off from his prior employment in February. Kristine Birchall also advised that she was an organizer. (GC Exh. 10.) She stated that her last employment had ended on March 17. Neither applicant was hired.

Shalvey's remaining two salts applied later that month. In his application filed on May 14, Michael Lemieux reported that he was "working with union organizing dept." (GC Exh. 11.) He completed the prior employment history portion of the form in a haphazard fashion, noting that he had been laid off, but failing to provide the date. He also provided only a cursory description of his work experience. He was not offered a job.

Finally, on May 19, David Pina filed an application that indicated his union membership. (GC Exh. 12.) He advised that he had been laid off from his prior job on February 13. He was not hired.

The next person hired by the Company was Michael Costa. Costa applied on June 1. (GC Exh. 23.) At this point, Izzo was not advertising for employees. He testified that Costa's situation represented a unique opportunity. Costa had been working for another nonunion company located across the street. He had a fight with his boss and walked over to Izzo's location to seek employment. Izzo contacted Costa's employer and was told that Costa "was a good worker." (Tr. 246.) This impressed Izzo because he believed that this firm "only keeps great help." (Tr. 246.) In light of this, although he had no pending vacancies, he hired Costa as part of a practice of "stockpil[ing]" valuable employees. (Tr. 246.)

Izzo reported that the Company's next hire represented a similar situation. Steven Cacicia applied on June 8. (R. Exh. 25.) His brother, who was currently working for the Company as a helper, recommended him. Although there were no formal job vacancies, Izzo decided to hire him.

[16] Smith's application was incomplete. He reported that he had been convicted of a crime, but failed to provide the requested details.

During this period in spring and early summer, Shalvey continued his multifaceted campaign. He visited employees at their jobsites. In addition, on June 29, he addressed a letter to the Company's employees. In it, he asserted that,

> [i]t is no secret that there are several IBEW Union Organizers working at Izzo. These men are there to inform you of the benefits that you are missing and help you realize health benefits, annuities, and pensions can be available to all who work in the electrical industry. I encourage all of Izzo's journeymen wireman [sic] to ask the IBEW Organizers about the pay raises **they've** received in the short time they have worked their [sic]. Joe Izzo needs these men for their abilities and has compensated them with several pay increases. Ask Joe why they get them and you don't? [Emphasis in the original.]

(R. Exh. 9.) This missive is a startling indication of the breadth and nature of Shalvey's assault on the Company. After having recently filed formal unfair labor practice charges alleging that the Company was discriminating against members of the Union, he was now alleging to its employees that the Company was discriminating in favor of such members.

In July, the Company had employees working on a job at Inskip Motors. One of them, Hafner, advised Shalvey that some employees wished to discuss union membership. As a result, Shalvey arranged a luncheon meeting with interested employees at a restaurant. Among those who attended was O'Brien. O'Brien testified that, "there was no question at all" that the group returned from lunch late. (Tr. 148.) He did not receive any discipline for this misconduct, but it was mentioned in a subsequent warning notice that he received for an unrelated incident.[17]

At the end of the month, Shalvey addressed another letter to the employees of the Company. He took note that they had recently received health care benefits. However, he characterized these benefits as "rather weak." (R. Exh. 10.) Nevertheless, he also opined that the offer of such benefits was made in response to his organizing effort. In order to illustrate his point regarding the inadequacy of the benefits, he attached a comparison of his Blue Cross, Blue Shield benefits offered through the Union with the Blue Cross, Blue Shield benefits offered to O'Brien by the Company.

As the summer progressed, O'Brien was assigned to work on a project at Roger Williams University. On his first day there, he was working alone, installing electrical fixtures. Another journeyman electrician criticized his productivity, telling him, "[h]ey old man, you are not in the Union now. You have to f---ing produce." (Tr. 139.) O'Brien became angry and telephoned the office, requesting assignment to another project. The foreman spoke to O'Brien, and in O'Brien's words, "tried to settle me down." (Tr. 140.) This was the end of the incident.

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[17] Counsel for the General Counsel finds the Company's subsequent citation of this incident to be evidence of animus and Izzo's lack of credibility. (GC Br. at p. 18.) I disagree. Quite properly, counsel notes that she does not contend that this disciplinary reference was unlawful. Given that it is uncontroverted that O'Brien returned from lunch late, I do not find anything suspicious or improper in the Company's reference to such misbehavior in a subsequent letter to him.

O'Brien reported the incident to Shalvey, contending that he had been harassed, "because of my age." (Tr. 140.) Although it was apparent that the alleged harasser was a fellow electrician, not a supervisor of the Company, and that O'Brien had claimed age discrimination, not antiunion discrimination, Shalvey filed an unfair labor practice charge arising from the episode. (R. Exh. 14.) O'Brien testified that this charge was later "dropped." (Tr. 152.)

On August 22, O'Brien voluntarily terminated his employment at the Company. As he described it, he did so in order to "go and work for a union shop." (Tr. 126.) On the next day, he began working for Rossi Electric, a union contractor. As of the time of the trial, he remained employed by Rossi.

Shortly thereafter, on September 7, Izzo hired Niall Moriarty. Battersby recommended Moriarty for employment. Izzo testified that Moriarty informed him that he was a union member. Moriarty worked for the Company until the Union called him back for employment with a union contractor.

On September 30, the Regional Director filed the complaint and notice of hearing in this matter, alleging discriminatory refusals to consider and hire the 4 applicants in March and 7 applicants in May. (GC Exh. 1(d).) At the same time, the Director addressed a letter to Shalvey, advising that no complaint would issue regarding the Company's failure to hire 10 earlier union job applicants because, "the Employer did not hire any electricians in February or early March 2004, and, therefore, did not discriminatorily refuse to consider or hire the applicants."[18] (R. Exh. 12.)

B. Legal Analysis

The Board has developed a precise framework for assessment of cases involving alleged discriminatory refusals to hire job applicants. In *FES*, 331 NLRB 9, 12—15 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002), it held that the General Counsel must initially demonstrate that the employer was hiring or had concrete plans to hire during the period under consideration, that the applicants possessed the qualifications announced by the prospective employer (or that such announced criteria were inconsistently applied or merely pretextual), and "that antiunion animus contributed to the decision not to hire the applicants." [Footnote omitted.] 331 NLRB at 12. If the General Counsel's evidence meets this initial test, the burden shifts to the employer to demonstrate that it would not have hired the applicants for reasons apart from their union support or activities.

It is noteworthy that the Board, in promulgating this analytical process, clearly indicated that it is derived from the methodology created in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for evaluation of claims of discriminatorily motivated adverse actions against current employees. Because of this continuity in choice of analytical method, the principles developed for use in assessment of employer motivation in cases involving allegations of discriminatory actions against current employees are equally applicable to allegations of discriminatory refusal to hire prospective employees. As the Board put it in *FES*, "we adhere to existing law on that issue." 331 NLRB at fn. 8.

[18] Those applicants were: Gregory Bowman, Joe Simons, Scott Bromage, Kevin Burns, Robert Gianfrancesco, Brian Murphy, William Williams, Louis DiNobile, Kevin Bishop, and Paul Ferrara. (R. Exh. 12.)

Having placed the framework for assessment in its full context, I will proceed with the necessary steps. Before commencing, it is necessary to address a preliminary, but highly important, consideration. Throughout these proceedings, counsel for the General Counsel has contended that the proper time period for evaluation begins with Shalvey's formal written notification to Izzo on February 16. In that letter, he informed Izzo that the Union intended to seek recognition as the collective-bargaining representative of the Company's employees. Counsel urges that examination of the employer's conduct from that date through June 2, the day of Costa's hiring, provides the proper period for analysis. As she puts it, from the moment he received Shalvey's letter, Izzo's hiring practices "changed abruptly." (GC Br. at p. 3.)

Counsel for the General Counsel's assertion that consideration be limited to this abbreviated period of time is significant, since she readily concedes that the Company's employment practices prior to that date were lawful. As she puts it, prior to February 16, "[r]espondent has a history of hiring electricians without regard to their union affiliation." (GC Br. at p. 3.) She justifies her position requiring exclusion of this earlier history because the employer only became aware of the effort to organize its work force upon receipt of Shalvey's letter.

I do not agree with counsel's proposal to examine only a truncated period of time. At the outset, I note that the Board has held that the necessary assessment be made with a broad focus. In another case of alleged discriminatory refusals to hire, it took pains to observe that the fact finder must consider "the total circumstances proved" and the "record as a whole." *Fluor Daniel, Inc.,* 304 NLRB 970, 970 (1991), enfd 976 F.2d 744 (11th Cir. 1992), rehearing denied 980 F.2d 1449 (11th Cir. 1992). In *K.W. Electric, Inc.*, 342 NLRB No. 126 (2004), slip op. at 1, the breadth of scope for the analysis was further emphasized. In that case, the Board noted that the fact finder must consider the employer's attitude toward union activity "more generally" than merely toward the protected activity at issue in the case. In *K.W. Electric*, such consideration included statements made by the employer after the decision to layoff the employee had been made. Although made after the events at issue, such statements were found to "reveal a strong and generalized antiunion sentiment that preceded the layoff." 342 NLRB No. 126, slip op. at fn. 5. It is apparent that I must consider and assess the totality of the evidence regarding the employer's motivation without undue limitation, temporal or otherwise.

Beyond a general requirement that a broad analysis be undertaken, I conclude that the premise for counsel for the General Counsel's proposed limitation of consideration to events after February 16 is flawed. In her view, the discrimination against union applicants began after the Union "announced its intention to organize." (GC opening statement, Tr. 21.) The implication is that, prior to this formal written announcement, Izzo was unaware of the Union's interest in organizing his work force. Once he gained knowledge of the organizing effort, he changed his hiring practices in an unlawful and discriminatory manner. The difficulty with this argument is that the evidence demonstrates that Izzo was aware of the organizing campaign well before he received the February 16 letter. Shalvey testified that he has been engaged in "various types of conduct to try to organize" the Company since roughly August 2003. (Tr. 63.) He confirmed counsel for the Company's assertion that, as of November of that year, he was "actively seeking to organize" the employer's work force. (Tr. 49—50.)

It is clear that Shalvey's organizing campaign began many months prior to February 16, 2004. I further find that Izzo was well aware of that campaign long before that date. Indeed, his knowledge commenced as early as January 2, 2003. On that date, Shalvey sent Izzo a letter referring a group of job applicants for consideration. He noted that he was doing so as "representative" of the Union. (R. Exh. 1.) The attached materials from the applicants included several demands for compensation at the union wage scale. Perhaps most strikingly, the letter

and materials were sent by certified mail. This was a method of dispatch seemingly inconsistent with a simple desire to volunteer employment information, but highly consistent with a desire to create a documentary record useful in legal proceedings. In the following week, Shalvey sent two additional packets of materials, also using certified mail. Izzo's testimony regarding his understanding of what Shalvey's correspondence meant was somewhat equivocal. He described the letters as "odd" and concluded that they were connected to organizing activity. (Tr. 206.) Nevertheless, he also indicated that he assumed that they represented an effort to find work for the named individuals.

I find that the January letters from Shalvey provided some notice to Izzo of the Union's interest in his firm. More importantly, Izzo gave uncontroverted testimony that, during 2003, his employees reported to him that the Union was "trying to organize" them. (Tr. 205.) I find this testimony to be credible as it fits the general picture of a small shop in which many employees communicated directly with the owner, and with Shalvey's testimony that he was actively engaged in such activity during that period. If any lingering doubt as to Izzo's knowledge of the Union's intentions remains, it is dispelled by the testimony of both men indicating that Shalvey twice telephoned Izzo in December 2003 or January 2004. On both occasions, he informed Izzo that, in his own words, "we will continue to pursue this organizing campaign." (Tr. 76.) Thus, while I generally agree with counsel for the General Counsel that the focus of scrutiny should be on the period after the employer became aware of the organizing campaign, I find that this key timeframe commenced long before February of 2004. I will, therefore, assess the Company's hiring behavior and attitude toward protected activity in general during the period commencing in early 2003.

Turning now to the first step in the evaluation, the General Counsel bears the burden of establishing that the Company was hiring or had concrete plans to hire during the periods around March and May of 2004 when the applicants named in the complaint sought employment. Counsel for the Company vehemently asserts that this burden was not met, characterizing the General Counsel's position as "topsy-turvy." (R. Br. at p. 1.) Instead, I agree with counsel for the General Counsel's contention that the polar opposite is true. In fact, the evidence demonstrates that the Company is always open to hiring qualified electricians.

In assessing the Company's hiring policies and practices, the focus must be on Izzo himself. He was the sole hiring official and made all the relevant decisions. It was clear from his testimony that he considered this to be a vital concern, one on which he focused considerable thought and energy. In part, this stemmed from his recognition that the Company operated in a tight labor market for electricians. This situation required continual vigilance in order to maintain an appropriate staffing level. As Izzo summarized it, "[i]t's very difficult to get quality help." (Tr. 225.) These conditions also contributed to high turnover among the staff.

Izzo's response to these challenging economic realities was to maintain a constant search for electricians. The search continued during periods when the Company was less busy and it persisted whether or not the Company was running newspaper ads. As Izzo rather colorfully explained, he is always looking for "a diamond in the rough . . . a special person." (Tr. 232.) As a result, he did not match new hires with any specific vacancies. As he explained,

> [s]ometimes what happens is I'll hire—if I need two guys I will hire four because I know three of them are going to quit or they're just not going to be any good or so you try to get as many as you can within reason.

(Tr. 247.) He made the same point in describing his thinking when hiring O'Brien in March

despite the lack of formal vacancies, noting that, "I didn't care if I had extra guys. Through attrition they always seem to go away anyways." (Tr. 233.) As a consequence, it was his policy to "stockpile" employees so as to guarantee having enough skilled employees to meet his business commitments. (Tr. 246.)

In addition to proving that the Company has a practice of engaging in continuous hiring of qualified electricians, the General Counsel also demonstrated that the Company hired several specific candidates for employment as electricians during the period under examination. Thus, during March, Izzo hired O'Brien with a start date of March 29. He hired Robbins shortly thereafter, in April. In addition, he hired Costa on June 2. Finally, he brought on Cacicia on June 8.[19]

In sum, I find that counsel for the General Counsel has correctly assessed the evidence regarding the issue of available vacancies during the key period. As she puts it,

> Respondent should not be permitted to hide behind its claim of "no vacancy." The term has no practical meaning where this employer is concerned. In fact, Respondent frequently hires when it has no vacancies, and did so at least four times between March and early June.

(GC Br. at p. 22.) The General Counsel has met his burden in this regard.

I must next address the question of whether the 11 named job applicants met the Company's announced qualifications for employment as electricians. Once again, the General Counsel bears the initial burden as to this issue. *Jacobs Heating and Air Conditioning*, 341 NLRB No. 128, slip op. at p. 1 (2004).

The only announced requirement for employment as an electrician by the Company was licensure. The Company's newspaper advertisements in the *Providence Journal* all listed this key qualification. Beyond this, I conclude that the Company required licensure in the State of Rhode Island. Izzo testified that he hired Oscar Outlaw, an experienced electrician licensed in Connecticut. However, Outlaw was only brought on as a helper because he lacked licensure in Rhode Island. Thus, the Company's preexisting policy was to require licensure as an electrician by Rhode Island, the state where the Company was located and in which it performed the bulk of its work.

Turning to the written job applications filed by the 11 individuals named in the complaint, it is evident that 10 of them met the Company's minimum qualification. Each of those 10 reported licensure by the State of Rhode Island and included their license number as required on the Company's form. (GC Exhs. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12.) On the other hand, Applicant Callanan failed to provide this key information on his application. He neglected to complete the portions of the form that required inclusion of the number and state of licensure.[20] (GC Exh. 4.)

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[19] Counsel for the General Counsel does not allege that the hiring of Robbins and Cacicia involved unlawful discrimination against union applicants. She concedes that their hiring resulted from application of the Company's preexisting and nondiscriminatory hiring policies. (GC Br. at p. 10, fn 17.) However, she contends that O'Brien and Costa were chosen based on unlawful discriminatory intent. I will address this issue later in this decision.

[20] Counsel for the General Counsel correctly notes that Callanan's application generally "contained few details." (GC Br. at p. 7.)

He was not called to testify and there is no evidence indicating that he met the Company's minimum qualification for consideration for employment as an electrician. As a result, the General Counsel's claim arising from his application must be rejected at this point in the analysis.

Regarding the 10 remaining named job applicants, I must now analyze the evidence regarding the last, and crucial, element of the General Counsel's initial burden—whether the decisions not to hire these persons were based in a material or significant degree on unlawful animus against them because of their union affiliation and activities. As to this element of proof, counsel for the Company contends that, "[t]he General Counsel's case stumbles at the starting gate." (R. Br. at p. 10.) For reasons I will now discuss, I have concluded that he is correct. The General Counsel has not met his initial burden of showing that Izzo's decision not to hire any of the 10 remaining applicants was motivated to any significant degree by unlawful animus.

In reaching this conclusion, I have engaged in the broad-ranging inquiry that I have already noted as being required by the Board. In so doing, I have considered various factors in accord with the Board's mandate as expressed in *West Maui Resort Partners,* 340 NLRB No. 94 (2003), where it observed that,

> *Wright Line* requires the General Counsel to make an initial showing that the protected conduct was a motivating factor in an employer's decision to take [an adverse] action. Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.

340 NLRB No. 94, slip op. at p. 3.

Of course, direct evidence of unlawful hostile intent is often the most powerful and persuasive indicator of discrimination. Counsel for the General Counsel contends that such evidence exists in this case. She is referring to O'Brien's testimony that, during a second asserted employment interview, Izzo asked him to backdate a job application form. According to O'Brien, he asked Izzo for an explanation of this unusual request and Izzo told him that it was due to "problems with the Union." (Tr. 135.) As counsel states, if credited, this testimony would "most clearly" demonstrate unlawful animus. (GC Br. at p. 26.) It will be recalled that Izzo denied making any such statement and also denied having a second employment interview with O'Brien. As a result, counsel for the General Counsel is entirely correct in concluding that, "[t]he credibility of Paul O'Brien and Joseph Izzo is critical to a determination of whether Respondent's hiring practices were unlawful." (GC Br. at p. 15.)

Turning first to an assessment of Izzo's credibility as a witness, the General Counsel characterizes his testimony as self-serving and, hence, unreliable. Naturally, I have taken account of his clear personal, professional, and pecuniary interest in the outcome of this case. I agree that as to some matters Izzo shaded his testimony to serve his interests. For example, he was somewhat disingenuous in claiming that he did not know the union membership status of those of his employees who had a clearly extensive history of working for nonunion employers. Of course, while he did not technically know that these employees were not members of the Union, he certainly had every reason to believe this was the case. Similarly, his testimony regarding the nonexistence of job vacancies at certain times also reflected a desire to serve his cause by drawing technical distinctions. It is evident that, while there were no formal vacancies at those times, Izzo was always interested in hiring qualified personnel. However, none of these bits of self-serving testimony crossed the line into prevarication. I do not

conclude that Izzo resorted to falsehoods, but rather to the typical use of shading employed by highly interested parties in all sorts of litigation.

While portions of Izzo's account require the exercise of careful critical analysis, the overall effect created by his testimony was that of a highly focused and motivated small business owner. His description of his management of the Company was entirely logical and consistent with his legitimate business interests. For example, his extensive discussion of his tactics and strategies in the crucial area of hiring was highly persuasive because it made economic sense apart from any question of union organizing activity. In general, I found Izzo to be a relatively credible witness, so long as one took into account his obvious interest in these matters.

Understandably, counsel for the General Counsel turned a highly critical eye on Izzo's testimony while casting O'Brien's account in a golden glow. Strikingly, she asserts that, "O'Brien had absolutely nothing to gain from his testimony." (GC Br. at p. 15.) I strongly disagree. In fact, I conclude that the evidence demonstrates that O'Brien had a powerful motive to assist the Union's efforts here by any and all means. In many salting cases, the salts are simply committed union adherents who engage in their covert organizing activity out of a sense of dedication to a cause. O'Brien, however, engaged in his covert infiltration of the Company for clear and compelling economic reasons.

It will be recalled that O'Brien testified that, prior to the events at issue, he found himself in troubling and precarious economic straits. As he described it, he was a man in his fifties who was unemployed and had an employment history characterized by jobs that afforded him substandard benefits and no pension plan. As a result, he decided that he would seek admission to the Union. He contacted Shalvey and importuned him about membership to such a degree that he reported that he must have "been a pain in [Shalvey's] side" due to his persistence. (Tr. 128.) During one of their conversations about O'Brien's quest for membership, Shalvey mentioned the organizing effort at the Company. O'Brien promptly volunteered his services as a covert applicant. His offer was accepted and he obtained employment with the Company. After Izzo offered him the job, he was given the Union's proficiency examination, a prerequisite for membership in the Union. After passing that test and gaining union membership, he began working for the Company. He remained in that position for a number of months until the Union secured employment for him at another Union affiliated firm. As a result, his objective of securing membership in the Union so as to create a solid foundation for his economic future was obtained. This history reveals compelling evidence of motivation to provide his economic benefactor with powerful testimony of the sort that would demonstrate Izzo's unlawful animus. Far from being a disinterested witness whose accounts would be entitled to enhanced credibility, I find O'Brien to be a highly partisan participant in these proceedings whose uncorroborated assertions must be viewed with healthy skepticism.

In comparing the conflicting testimony of these two men, I have not simply relied on my general conclusions about their motivations and reliability. Instead, I have also focused on the content of their differing versions of events. Comparison of those accounts reveals that Izzo related a simple, straightforward, logical, and consistent description of the hiring process involving O'Brien. In contrast, O'Brien provided a complicated, Byzantine, and illogical description of Izzo's behavior during that process.

It will be recalled that Izzo reported that one of his employees, Croshaw, recommended O'Brien as someone that he had worked with before who was "a good worker, a good guy." (Tr. 212.) Izzo told Croshaw to ask O'Brien to contact him. O'Brien did so, and the men scheduled a meeting. At that meeting, O'Brien began to complete one of the Company's job application

forms. Early on in the interview, two things became apparent to both men. Izzo was highly impressed with O'Brien's qualifications and presentation. In contrast, O'Brien was strongly dissatisfied with the compensation that Izzo was prepared to pay him. As a result of this, the interview concluded after only about 10 minutes. O'Brien departed before completing the application form.

Izzo continued his account by noting that some weeks later O'Brien telephoned him to report that he was now prepared to agree to Izzo's proposed offer of compensation. Since the two men had already met and O'Brien had left a favorable impression, Izzo offered him the job. O'Brien accepted and requested a start date 2 weeks later in order to provide the customary notice to his current employer. This request was granted. Thus, according to Izzo, there was only one employment interview and one partially completed job application.

O'Brien told a highly different story. Although he agreed that he had worked with Croshaw in the past and suspected that Croshaw would give him a good reference, he denied contacting Izzo based on any referral from Croshaw. Instead, he reported that he called Izzo because he had read the Company's newspaper advertisement. The two men met and O'Brien began to fill out an application form. When he learned that the Company's pay proposal would be far less than what he was earning, he terminated the interview and departed. Weeks later, after having volunteered to assist Shalvey in his organizing campaign, O'Brien recontacted Izzo by telephone to ask if the job were still available. He reports that Izzo instructed him to come in for a second interview.

During that reported second job interview, O'Brien requested a 2-week delay in his start date so that he could complete a home improvement project on his residence. He testified that Izzo instructed him to prepare a job application form, but advised that he did not need to complete the portion of the form regarding prior employment history. Izzo then requested that O'Brien backdate the form. O'Brien testified as to what transpired next,

> I just asked him—if I remember correctly, I just asked him why he wanted it back dated. I thought it was kind of strange, which apparently he said that he was having some—hold on—I don't want to get this wrong. I think—problems with the Union was I believe the word that he used.[21]

(Tr. 135.) O'Brien reports that he acceded to this request, preparing a second job application form containing the date of January 13. He selected this date because it was his daughter's birthday. Izzo checked the calendar to verify that the date selected did not fall on a weekend. Finally, O'Brien reported that during his employment interview he questioned Izzo about why he did not sign an agreement with the Union and Izzo responded that "he was thinking about it." (Tr. 172.)

[21] Counsel for the General Counsel touts O'Brien's "precision" while giving this testimony. (GC Br. at p. 16.) I do not comprehend her point. Examination of the quoted language, arguably the most important bit of testimony in this case, reveals it as a model of imprecision, qualification, and equivocation. In three short sentences, O'Brien uses the phrases: "if I remember correctly," "apparently," "hold on—I don't want to get this wrong," "I think," and "I believe." The use of so many qualifiers as to such key testimony strongly undermines the reliability of O'Brien's account.

At this point, it is instructive to examine a key piece of documentary evidence, GC Exh. 22. O'Brien testified that this was the job application form that he completed on March 11 and, at Izzo's request, backdated to January 13. Izzo testified that this document was the job application form that O'Brien began preparing during their interview in January and left incomplete when he terminated the interview due to the salary disagreement.

Examination of the document supports Izzo version. The very first item on the form to be completed by a job applicant is the date. O'Brien completed this by writing, "1-13-04." He provided his contact information, driving history, EEO information, and electrician's licensure. He did not complete the sections regarding education, criminal history, or work experience. The final section of the form requires the applicant to authorize the Company to contact others to investigate the applicant, authorize access to the applicant's credit history, and acknowledge that misrepresentations in the application are cause for dismissal. The applicant is required to sign and date this portion of the form.

The manner in which O'Brien partially completed the form is consistent with Izzo's account that O'Brien began preparing the form as the men talked in January. He commenced by filling in the date at the top and proceeded to provide his contact information. He completed other sections of the form, leaving the more detailed education and employment history sections blank. After it became apparent that the men would not reach agreement, he departed, leaving the ultimate signature and date lines empty.

By contrast, the document does not support O'Brien's claims regarding the application form. O'Brien contends that Izzo was intent on using this form as fraudulent evidence designed to rebut the Union's claim that he was engaged in discriminatory hiring practices. He was so determined to accomplish this objective that he not only instructed O'Brien to backdate the form, but also checked his calendar to be sure that the date O'Brien selected was a weekday. O'Brien's account would require that one believe that, despite the careful manner in which Izzo supposedly crafted his fraud, he neglected to have O'Brien sign the bottom of the application and fill in the space for the date next to his signature. This makes no sense. I conclude that inspection of this key document provides powerful support to Izzo's testimony.

Overall, I find that Izzo's account of his hiring process regarding O'Brien is clear, simple, logical, straightforward, and consistent with the documentary evidence. O'Brien's version of the same events is convoluted, illogical, and at variance with that same documentary evidence. Based on my overall assessment of the credibility of these two witnesses and scrutiny of the particulars of their accounts of the vital transaction, I credit Izzo's testimony as reliable and reject O'Brien's testimony as untrustworthy. As a result, I do not find any direct evidence of unlawful intent.[22] See *American, Inc.*, 342 NLRB No. 76, slip op. at p. 1 (2004), where the Board held that the judge properly refused to rely on discredited testimony as evidence of discriminatory motivation.

Although I have found that no credible direct evidence of unlawful animus exists, this does not end the inquiry. The Board has held that it is, "well established that a discriminatory motive may be inferred from circumstantial evidence and that direct evidence of union animus is not required." *Tubular Corporation of America*, 337 NLRB 99 (2001). As a result, I will examine the record as a whole in order to determine whether circumstantial evidence demonstrates the presence of unlawful animus as a motivating factor in the Company's hiring decisions during the

[22] As will shortly be discussed, there is no contention that other direct evidence of unlawful animus exists.

period under scrutiny. In so doing, I am mindful of the limitations on such evidence outlined by the Board in *Cardinal Home Products,* 338 NLRB 1004 (2003), where it held that:

> [w]hile the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of the circumstances must show more than a "mere suspicion" that union activity was a motivating factor in the decision. [Citation omitted.]

338 NLRB at 1010.

A key factor in my assessment is the comparison between Izzo's preexisting hiring policies and practices and the actual hiring decisions made during the period at issue. The primary evidence regarding the Company's policies and practices was providing by the sole hiring official, Izzo. Because of the Company's size and informal manner of operating, there are no written hiring memoranda or manuals. The absence of these materials in this case is not probative. The Board has noted that there is no legal requirement that hiring policies be reduced to writing. *Cobb Mechanical Contractors, Inc.*, 341 NLRB No. 136, slip op. at fn. 3 (2004). I found Izzo's testimony regarding his practices to be credible. It was evident that he considered hiring to be among his most vital concerns and had devoted considerable thought and attention to the problems presented in obtaining reliable, qualified staff in a tight labor market. His testimony explaining his decisionmaking process was logical and persuasive.[23]

Izzo described a hiring process based on application of several principles gleaned from his experience as an employer and applied by him over the course of at least 10 years. First and foremost, he had a strong preference for hiring individuals that had been referred by his current employees. He explained his reasoning as follows:

> I feel that the people that [his current employees] know are the people that I would want to know because they are not going to recommend someone to me that is not a good worker or untrustworthy.

(Tr. 192.) Because of his strong belief in the value of such a referral system, he offers cash bonuses to employees who make referrals that result in successful new hires.

In addition to being supported by logic and common sense, such a referral policy, if neutrally applied, has met with approval from the Board. In *CBI Na-Com., Inc.*, 343 NLRB No. 88, slip op. at p. 1 (2004), it held that "an employer legitimately may implement a hiring policy based on a hiring system that gives preference to . . . employees referred by current

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[23] It was also uncontroverted. While in some cases this factor may not add much, it is compelling in the circumstances of this case. The record reflects that throughout the period under consideration the Company employed numerous union members. Since at least December 2003, salts were among them. Those salts did not hesitate to report any pertinent information to Shalvey. As merely one example, a salt informed Shalvey that he "wasn't sure" if the Company were maintaining the proper ratio of electricians to helpers. (Tr. 62.) Based on this sketchy information, Shalvey filed a complaint against Izzo with the appropriate state authorities. I conclude that if interested employees had been aware of any information to suggest that Izzo's description of the Company's hiring policies was inaccurate, it would have been conveyed to Shalvey.

employees." I find that Izzo utilized such a preference. I also find that it was applied in a neutral manner. In other words, Izzo hired persons who were referred by his current staff regardless of their union affiliation. An illustrative example concerns his hiring of Hafner, a union member who was referred by Battersby, another union member. Izzo provided uncontroverted testimony that Battersby told him that Hafner was a union member. Battersby promised that he would "vouch for him. He is a good worker." (Tr. 209.) Based on this, Izzo hired Hafner.

Beyond preferring applicants who were known to his current workers, Izzo expressed another strong preference. He testified that,

> my prime goal is to actually take people that are with other companies that are presently working because they have been there for a number of years and I want that type of a person.

(Tr. 192.) Later in his account, he explained that this preference stems from his experience that, "[e]verybody I ever hired from that respective group are still here." (Tr. 283.)

While Izzo's preference for snatching electricians from his competitors strikes me as rather predatory, if neutrally applied there is no reason that it would violate any principles involved in the application of the Act. Such a policy is supported by logic. In a tight labor market, one may question the reasons why an electrician would be unemployed for any significant period. Put another way, an electrician who is currently employed but who desires to join the Company's work force may likely be highly motivated to succeed in his or her new position. Beyond this, in the tight job market, any electrician lured from a competitor promises to strengthen Izzo and weaken his competitor. Given the dearth of qualified applicants, hiring of electricians in this geographical area appears to be a zero sum game. These considerations persuade me that Izzo's strong preference for currently employed applicants is grounded in neutral economic considerations, not discriminatory motives.

Finally, Izzo indicated that, beyond these two broad imperatives, he hires as opportunities present, including "by pure luck." (Tr. 263.) As he put it, he is always searching for "a diamond in the rough." (Tr. 283.) As part of that search, he frequently places advertisements in the newspaper. As the Board has observed in a case involving similar facts,

> the judge also relied, as evidence of animus, on the fact that the Respondent ran frequent employment advertisements despite doing virtually all of its hiring from referrals. Apparently, the judge found this practice suspect. We do not. The Respondent did not meet all its hiring needs through referrals alone, so it had to advertise for applicants.

Ken Maddox Heating & Air Conditioning, Inc., 340 NLRB No. 7, slip op. at p. 4 (2003).

I conclude that there is nothing in the Company's established hiring practices that suggests reliance on an improper motive. Furthermore, application of those policies satisfactorily explains the decisions not to hire any of the 10 qualified applicants who are asserted to be the victims of discrimination in this case. The evidence shows that none of those applicants were referred by current employees of the Company. Equally important, none of

those applicants were presently employed at the time they sought work for the Company.[24] As a result, the decisions not to offer them jobs were consistent with the two key preferences used by Izzo in selecting his complement of employees.

In reviewing Izzo's hiring decisions, it is evident that not all of them were made in conformity with the two policies articulated above. For example, a number of employees were hired from among persons who simply responded to the Company's ads. Significantly, these applicants included persons without Union affiliation, as well as, numerous persons with Union affiliations. For example, Outlaw and Laouar told Izzo that they were union members. Battersby, Turner, Stromberg, and Day were also known union members as indicated on their application forms. I do not find that the decision to hire applicants who were not referred or were not currently employed stemmed from any discriminatory motive. Rather, those decisions appear to have flowed from the tight labor market conditions that rendered total adherence to the hiring preferences impossible. As Izzo put it, "[i]t's very difficult to get quality help." (Tr. 225.) The fact remains, for reasons unrelated to union status, if Izzo was able to obtain electricians who were currently employed or who benefited from employee's referrals, he did so.

More specifically, Shalvey and counsel for the General Counsel contend that the 10 named and qualified union job applicants should have been hired in preference to Izzo's actual hires of Paul O'Brien and Michael Costa. It will be recalled that none of the 10 were referred by Izzo's employees. In addition, none of the 10 were currently employed. By contrast, O'Brien was referred by Croshaw.[25] Costa was currently employed by one of Izzo's competitors, a fact that was well known to Izzo. Given these realities, Izzo's choices do not appear to be suspicious.[26]

In addition to concluding that Izzo's hiring decisions were generally consistent with the evidence regarding the Company's preexisting hiring policies and practices, I have considered the statistical evidence regarding those decisions. The Board has approved the consideration this type of factor as circumstantial evidence on the issue of animus. *Glenn's Trucking Co.,* 332 NLRB 880 (2000), aff'd. 35 Fed. Appx. 229 (6th Cir. 2002). Counsel for the Company argues that the fact that "roughly 83% of the company's journeymen hires were 'known union'" adherents provides strong support for a conclusion that the General Counsel failed to establish unlawful animus. (R. Br. at p. 2.)

Counsel for the Company does not explain how he arrived at the 83 percent figure for union-affiliated hires. It may be that this figure includes some persons hired as helpers. In any event, I have made my own analysis of the hiring statistics during the period at issue, from

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[24] Interestingly, Shalvey testified that some of the applicants were currently employed. He was wrong. Their application forms all clearly show that they were not employed.

[25] Beyond this, I credit Izzo's testimony that O'Brien told him that he was currently employed and could not begin working for the Company until he gave his current employer the customary 2-weeks notice. It will be recalled that O'Brien confirmed that he sought the 2-week period prior to beginning employment. He contended that he told Izzo he needed the time to finish a home improvement project on his house. Given his testimony that he was gravely concerned with his financial situation, I doubt that he would have delayed the prospect of earning income for 2 weeks in order to finish painting a couple of rooms in his home. Izzo's version makes more sense.

[26] There is no contention that the two men hired were in any way less qualified than the other applicants. As counsel for the General Counsel put it, the Union applicants were "not more qualified but they were as qualified" as O'Brien and Costa. (Tr. 186.)

January 2003 forward. I find that the Company hired 8 journeymen electricians during this period who were known to be union affiliated. These hires consisted of James Battersby, William Burke, Steven Day, Michael Hafner, Mounir Laouar, Niall Moriarty, Paul Stromberg, and Earl Turner. He also hired 10 journeymen who were not affiliated with the Union. These included Carl Brownelle, Noel Koppisch, Daniel Leite, Michael Noelte, Michael Testa, Anthony Arias, Robert Cacicia, Daniel Costa, Keith Robbins, and Mark Smith.[27]

This leaves one remaining hire, Paul O'Brien. As to Izzo's understanding of his union status at the time he was offered employment, the evidence is somewhat less than precise. It is clear that he was not actually a member of the Union at that point. Nevertheless, he was applying for work as a covert union salt and was actively engaged in seeking and ultimately obtaining membership in the Union. He testified that during his claimed second meeting with Izzo he brought up the Union, asking Izzo why he did not reach an agreement with the Union. Izzo testified that he suspected that O'Brien was affiliated with the Union based on the fact that his application reflected a work history similar to that of other recent union affiliated applicants. While the state of Izzo's knowledge regarding O'Brien's background is not entirely clear, assignment of him to one group or the other does little to alter the statistical result.

During the period at issue, the Company hired 17 journeymen electricians. Of these, 8 were union affiliated and 8 were not. If O'Brien is included as a union hire, approximately 53 percent of the Company's hires during the key timeframe were Union affiliated electricians. If O'Brien is excluded, the Company hired Union members to fill 47 percent of its positions. In order to appreciate the full significance of these numbers, one must place them in proper context. Shalvey testified that in the geographical area involved in this case, approximately two-thirds of the available electricians are not affiliated with the Union. As a consequence, the statistical evidence indicates that the Company selected union adherents at a rate considerably in excess of their general prevalence in the population of applicants. I find this fact to be probative circumstantial evidence of lack of unlawful animus.

In making this judgment, I have reflected on a pertinent concern raised by counsel for the General Counsel. Citing *H.B. Zachry Co*., 332 NLRB 1178 (2000), she correctly observes that, "the fact that other union applicants were hired is not dispositive of the issue." (GC Br. at p. 26.) In *Zachry*, the Board cautioned that, "an employer's failure to discriminate against all applicants in a specific category is not decisive in cases involving refusal-to-hire allegations." 332 NLRB at 1183. In my view, the proper perspective for analysis of the import of such evidence was described by another administrative law judge in a case where the Board affirmed a finding of no unlawful animus. The judge discussed the issue as follows:

> it is worth noting that at least three of the seven individuals hired by the Respondent in September and October of 2000 were either current or former union members. In the case of two of those hirees . . . the evidence showed that the Respondent was aware of the union affiliation at the time it made the selections. Although it is still possible that the Respondent would seek to exclude other union members, that evidence does cast

[27] In determining the status of Izzo's knowledge regarding these successful job applicants' union affiliation at the time Izzo decided to hire them, I have generally credited Izzo's testimony. It was largely uncontroverted. Beyond this, I deemed him to be a generally reliable witness regarding his hiring decisionmaking process.

> further doubt on the General Counsel's allegation of discriminatory hiring.

J.S. Mechanical, Inc., 341 NLRB No. 46, slip op. at p. 9 (2004). The same is true in this case. While this evidence, standing alone, does not carry the day, it is indicative and probative.

One final piece of the circumstantial mosaic must be discussed. Paradoxically, it involves the evidence that was not present. As was illustrated in a story about the illustrious fictional consulting detective, Sherlock Holmes, sometimes the best clue concerns the evidence that does not exist. In the case of *Silver Blaze*, Holmes deciphered the identity of the perpetrator of the crime based on the unexpected failure of a dog to bark. He told Dr. Watson that, "I had grasped the significance of the silence of the dog, for one true inference invariably suggests others."[28] In my view, this case also includes a telling silence from which it is possible to infer a great deal about the ultimate issue.

The missing evidence to which I refer concerns expressions made by the employer that would reveal anger, hostility, malice, or other forms of opposition to the Union. Although I have examined the Company's conduct over a 2-year period, I have concluded that the record is devoid of any credible evidence that Izzo or other agents of the Company made any such statements reflective of antiunion sentiment. This is particularly striking because of two other factors that exist in this case. First, it will be recalled that the Union successfully placed several salts on the Company's payroll. Stromberg, Battersby, and Hafner were hired in December 2003. O'Brien was hired in the following March. These men were in constant contact with Shalvey. For example, Battersby kept him informed regarding the Company's staffing situation. An unnamed salt told Shalvey that he was unsure whether the Company was maintaining the proper staffing ratio between journeymen and apprentices. O'Brien provided Shalvey with documents describing the Company's health benefits. Perhaps the best indicator of the level of communication was Shalvey's testimony that, after O'Brien began working for the Company, he spoke with Shalvey "at least three to four times a week." (Tr. 40.) Rarely was a union so well positioned to observe what went on within a company that it was seeking to organize. Multiple union supporters were ready, willing, and able to report any useful information, especially any observations suggestive of misconduct by officials of the Company. Despite this, there was no evidence that Izzo or his managers ever made disparaging remarks about the Union or expressed any hostility to the Union's attempt to organize his work force.[29]

The lack of evidence of overt opposition to the Union is striking not only because of the Union's breadth of penetration of the Company's work force and resultant opportunity to gain knowledge of such statements, but also because of the intentionally highly provocative nature of the Union's organizing campaign. It will be recalled that Shalvey's offensive against the Company was mounted on an astonishingly large number of fronts, employing a broad and creative range of tactics. Aside from sending salts to test the Company's compliance with the Act and to organize the work force, Shalvey arranged pickets, reported multiple alleged violations of Federal and State laws, corresponded with the work force by claiming that the Company was discriminating in favor of union-affiliated employees, and contacted the

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[28] Doyle, Sir Arthur Conan, "Silver Blaze," The Annotated Sherlock Holmes, Vol. II, William S. Baring-Gould, New York, Clarkson N. Potter, Inc., 1960, p. 280.

[29] The only evidence even remotely suggestive of such animus was O'Brien's claim that Izzo asked him to backdate his application. Even in O'Brien's account, this request was not accompanied by any expression of hostility. In any event, I have rejected O'Brien's claim that Izzo made any such request.

Company's customers to report that the Company was a "**law violater**." [Boldface and underlining in the original.] (R. Exh. 8.)

I have no difficulty inferring that much of this behavior was designed to induce the employer to engage in the sort of conduct and statements that are so notably missing in this case. As the Seventh Circuit has noted, there is "widespread suspicion" that one of the objectives of a salting campaign is to "precipitate the commission of unfair labor practices by startled employers." *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB,* 280 F.3d 1110, 1112 (7th Cir. 2002). Despite all the forms of adversary action taken by the Union against Izzo and his company, the record is barren of any history of discrimination against those employees who were members of the Union. It is equally devoid of any credible expressions of malice against the Union or its members, including those members who sought employment with the Company. Indeed, it is instructive to contrast the absence of such evidence in this case with the circumstances presented in *Zachry*, the case cited by counsel for the General Counsel as standing for the proposition that an employer's failure to discriminate against some union applicants is not a decisive defense to a refusal-to-hire allegation involving other applicants. In *Zachry*, the Board took care to note statements by the company's hiring official indicating that he was refusing to take job applications because union organizers had sought employment. In addition, the company's foreman was overheard to remark that the company had ways of avoiding the hiring of union organizers. Lastly, the Board cited its prior finding in an earlier case that the company had "engaged in widespread 8(a)(1) violations and unlawfully discharged two employees." 332 NLRB at 1182. The absence of any such evidence in this case speaks as loudly as the silence of Sherlock Holmes' barnyard dog.

To summarize, based on a review of the totality of the evidence and circumstances involved in this case, I find that the Company was hiring electricians during the period under consideration. With one exception, the applicants cited by the General Counsel had the necessary qualifications for jobs with the Company. They applied for those jobs and were not hired. I further conclude that the General Counsel has failed to meet his initial burden of showing that the decisions not to hire these applicants were motivated to any material or significant degree by animus against the Union or against the applicants due to their involvement with the Union. This conclusion follows inexorably from my determinations that there is no credible direct evidence of discriminatory motivation and that assessment of the circumstantial evidence regarding the Company's hiring process reveals that it was generally consistent with preexisting neutral policies and preferences, statistically inconsistent with an inference of discrimination, and unaccompanied by other evidence of unlawful (or even lawful) expressions of antiunion hostility or animus. Absent proof of any unlawful discriminatory motivation, it is impossible to find that the Company's refusal to hire the applicants violated the Act in the manner alleged in the complaint. *Vae Nortrak North America, Inc.,* 344 NLRB No. 12 (2005).

In the interest of decisional completeness, I will address the remaining portion of the Board's analytical framework for a refusal-to-hire allegation. If I were to assume that sufficient evidence existed to find that discriminatory motivation formed a material part of the employer's decisions to refuse to hire the applicants, then the burden of persuasion would shift to the Company to show that:

> it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the

> position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

FES, supra., 331 NLRB at p. 12.

In her brief, counsel for the General Counsel frames the issue at this point in the inquiry by noting that, "[i]n particular, the General Counsel takes the position that Respondent had two job openings for which union applicants should have been considered and hired." (GC Br. at p. 23.) Those positions are the ones that were filled by the hiring of Paul O'Brien and Michael Costa.

As part of my analysis of the circumstantial evidence on the issue of discriminatory motivation, I have already assessed the Company's hiring policies and practices and its proferred reasons for preferring to hire O'Brien and Costa instead of any of the named union applicants. I have found that the Company maintained two policies that governed its decision-making process, preferences grounded in neutral economic considerations. These two policies consisted of a preference for applicants who were favorably recommended by current employees of the Company and a similar preference for applicants who were currently employed by a competitor's business. It is noteworthy that none of the named applicants met either of these preferences. By contrast, O'Brien was recommended by Croshaw and indicated that he was currently employed.[30] Costa was known to Izzo as an employee of one of his competitors. These factors provide a rational and consistent explanation for the decision to hire these two men. This is particularly true in the context of a hiring process that was devoid of evidence of antiunion hostility manifested by word or deed and that had resulted in the employment of numerous electricians with known union affiliations. I conclude that the Company met its burden of establishing that it would have hired O'Brien and Costa in favor of the named applicants even in the absence of any discriminatory motivation.

In addition to alleging an unlawful refusal to hire the named applicants, the General Counsel also alleges a refusal to consider them for employment. The Board has noted that the elements of this type of misconduct are somewhat distinct from those involved in a refusal to hire. In *Tim Foley Plumbing Service,* 337 NLRB 598, fn. 5 (2002), the Board enumerated the steps in the analysis as follows:

> [T]he General Counsel must show (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment . . . . In a refusal-to-consider case, the General Counsel is *not* required to establish (as in a refusal-to-hire case) that the applicants had relevant experience or training. [Italics in the original.]

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[30] As already noted, I reject his claim that he told Izzo he needed 2 weeks' notice in order to finish painting a couple of rooms in his home. Instead, I credit Izzo's account that he sought the customary notice period in consideration of the needs of his current employer. Whether O'Brien was being truthful about his current employment status is another question—one that is immaterial to the issue of Izzo's beliefs regarding his employment situation. I readily conclude that Izzo believed that O'Brien was employed at the time he was chosen for hire by the Company.

The Board went on to note that the General Counsel is also not required to show that the employer had any job openings for a particular applicant.

Based on consideration of the totality of the evidence already described, I find that the Company did not exclude the 11 named applicants from its employment process. Izzo testified that he received their applications and examined them.[31] In so doing, he would have noticed that they did not possess either of the preferential factors that he deemed of the foremost significance. I further find that the General Counsel did not carry the initial burden of showing that the treatment of these applicants' requests for employment was motivated to a material or significant degree by unlawful animus. I reach this conclusion based on the same considerations I have discussed in reference to the claim of an unlawful refusal to hire. Based on these findings, I conclude that the General Counsel failed to prove that the Company unlawfully refused to consider any of the 11 applicants for employment.

Finally, I note that counsel for the Company requests that his client be awarded counsel fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504. In this regard, he acknowledges that the amount of any such award would need to be established later, "once Izzo Electric submits proof of its fees and costs." (R. Br. at p. 14.) This request is not timely. The Board's Rules and Regulations provide, in pertinent part, that such an application may be filed "after the entry of the final order establishing that the applicant has prevailed." Rule 102.148(a). No such final order exists in this case. See: Rules 102.45 through 102.48. As a result, it is inappropriate to further address his request.

Conclusion of Law

The Company did not violate the Act in any of the ways alleged by the General Counsel in the complaint and notice of hearing dated September 30, 2004.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[32]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 31, 2005

Paul Buxbaum
Administrative Law Judge

[31] Izzo's testimony was that he "looked at" their applications and "considered" them. (Tr. 223 and 225.) As with his other testimony regarding his hiring process and decisionmaking, I credit this account.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX CONTAINING TRANSCRIPT CORRECTIONS

TRANSCRIPT PAGE AND LINE	ORIGINAL VERSION	CORRECTED VERSION
Tr. 23, l. 11	percent	present
Tr. 27, l. 24	The transcription is garbled but I am unable to recall the correct language.	
Tr. 34, l. 12	parts	parties
Tr. 113, l. 13	clan	client
Tr. 119, l. 13	were	start
Tr. 135, l. 12	chord	word
Tr. 185, ll. 1, 2, 3	disparities	dispositive
Tr. 214, l. 8	himmed	hemmed
Tr. 214, l. 13	The word “never” should be deleted.	
Tr. 233, l. 9	nutrition	attrition
Tr. 249, l. 24	liability	reliability
Tr. 279, l. 24	The word “no” should be deleted.	
Tr. 281, l. 21	withdraw	withdrawal
Tr. 282, l. 7	sustained	succinct
Tr. 285, l. 14	person	reason
Tr. 290, l. 21	googols	gulags